

**United States Department of Labor
Employees' Compensation Appeals Board**

H.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lorain, OH, Employer**

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**Docket No. 17-0365
Issued: April 26, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 7, 2016 appellant, through counsel, filed a timely appeal from an October 24, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than seven percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 9, 2012 appellant, then a 54-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right shoulder when he tripped on a curb and fell to the ground. He stopped work on January 9, 2012. OWCP accepted the claim for a sprain of the right shoulder and upper arm and a right rotator cuff tear. It paid appellant compensation for total disability beginning February 24, 2012.

On March 27, 2012 appellant underwent a right rotator cuff repair with subacromial decompression and debridement at the glenohumeral joint, labrum, biceps, and rotator cuff. He returned to work full time with restrictions on December 12, 2013.

Appellant, on November 18, 2014, filed a claim for a schedule award (Form CA-7). By letter dated December 5, 2014, OWCP requested that he submit a report from his attending physician addressing the extent of any employment-related permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter A.M.A., *Guides*).³

By decision dated March 23, 2015, OWCP denied appellant's schedule award claim. It noted that he had not submitted an impairment evaluation as requested.

On March 30, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In a March 31, 2015 impairment evaluation, Dr. Catherine Watkins Campbell, Board-certified in family practice, discussed appellant's history of injury and reviewed his functional status questionnaire. On examination, she found tenderness at the acromioclavicular joint and anterior glenohumeral and 4/5 muscle strength of the shoulder possibly related to pain. Dr. Watkins Campbell measured range of motion (ROM) of the right shoulder three times. Referencing the sixth edition of the A.M.A., *Guides*, and utilizing the ROM methodology, she opined that appellant had 20 percent permanent impairment of the right upper extremity.

An OWCP medical adviser reviewed the report from Dr. Watkins Campbell on June 25, 2015 and disagreed with her use of the ROM method as it was a "less preferred" method of rating impairment under the A.M.A., *Guides*. He further determined that, under Table 15-34 on page 475, appellant had 10 percent rather than 20 percent permanent impairment of the right upper extremity due to loss of motion. Utilizing the diagnosis-based impairment (DBI) method, the medical adviser identified the diagnosis as a class 1 full-thickness rotator cuff tear with residual dysfunction using Table 15-5 on page 403, which yielded a default value of five percent. He applied grade modifiers and concluded that appellant had seven percent permanent impairment of the right upper extremity.

By decision dated December 2, 2015, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity. The period of the award ran for 21.84 weeks from January 22 to June 23, 2015.

³ A.M.A., *Guides* (6th ed. 2009).

Appellant, through counsel, on December 8, 2015 requested a telephone hearing. At the telephone hearing, held on August 9, 2016, he argued that ROM was a valid basis for a schedule award rating.

In a decision dated October 24, 2016, OWCP's hearing representative affirmed the December 2, 2015 decision. She found that the opinion of OWCP's medical adviser constituted the weight of the evidence and established that appellant had no more than seven percent permanent impairment of the right upper extremity.

On appeal counsel argues that the A.M.A., *Guides* provide that the evaluator should use the method that provides the maximum impairment rating. He cites *T.H.*⁴ in support of his request to remand the case.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.⁵ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁶ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁸ The Board has approved the use by OWCP of the A.M.A.,

⁴ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

⁵ See 20 C.F.R. §§ 1.1-1.4.

⁶ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁷ 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁹

ANALYSIS

The issue on appeal is whether appellant has more than seven percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹⁰ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹¹ In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.¹²

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the October 24, 2016 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

⁹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ *Supra* note 4.

¹¹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹² *Supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 26, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board